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Nos. 81-729 and 81-730

In the Supreme Court of the United States

OCTOBER TERM, 1981

BENJAMIN LADMER, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY DiLAPI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, given a refusal by the General Counsel of the National Labor Relations Board to produce privileged materials pursuant to a defense subpoena before testing his duty to produce the materials by appealing from a contempt order, and given the resulting dismissal of the unsworn jury and delay of trial pending final determination of that appeal, petitioners were entitled to dismissal of the indictment (a) on the basis of the principle enunciated in *Jencks* v. *United States*, 353 U.S. 657 (1957); (b) on grounds of double jeopardy; or (c) on grounds of denial of a speedy trial.

2. Whether the right to counsel was violated by trial court rulings (a) restricting the use of the materials produced by the General Counsel, and (b) forbidding petitioner DiLapi to confer with counsel during a five-minute recess in his cross-examination.

3. Whether petitioner DiLapi was properly sentenced.

4. Whether the trial court's supplemental instructions permitted the jury to return a verdict that was not unanimous (No. 81-729 only).

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioners' convictions (Pet. App. 1a-22a)[1] is reported at 651 F.2d 140. The opinion of the court of appeals

[1] "Pet. App." references are to the appendices to the petition in No. 81-730.

affirming on interlocutory appeal the denial of petitioners' motion to dismiss the indictment on grounds of double jeopardy (Pet. App. 46a-49a) is reported at 616 F.2d 613. The opinion of the court of appeals affirming in part, vacating in part, and remanding the order of the district court holding the General Counsel of the National Labor Relations Board in criminal and civil contempt for refusing to produce documents subpoenaed by petitioners (Pet. App. 24a-45a) is reported at 600 F.2d 1027, cert. denied, 444 U.S. 866.

The order of the court of appeals granting in part petitioners' petition for a writ of mandamus (Pet. App. 50a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1981. A petition for rehearing was denied on August 19, 1981 (Pet. App. 23a). The petitions for a writ of certiorari were filed on October 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of obstructing a National Labor Relations Board proceeding, in violation of 18 U.S.C. 1505, and of conspiring to do so, in violation of 18 U.S.C. 371. Each was sentenced to consecutive terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-22a).

1. The evidence showed an attempt by petitioners and others[2] to induce Matthew Eason, president of Local 20408 of the United Warehouse Industrial and Affiliated Trades Employees Union, to withdraw a representation petition that he had filed with the NLRB; the inducement consisted of both threatening Eason and the employees whom he represented and offering Eason a monetary bribe to withdraw the petition (Pet. App. 2a-5a).

The employees in question had formerly worked for Interstate Dress Carriers, Inc., which had entered into a collective bargaining agreement with Local 102 of the International Ladies Garment Workers Union (*id.* at 3a). Interstate caused the formation of two purportedly independent employment agencies—GS Supply Associates, Inc., and GS Temporary Service, Inc.—and transferred three-quarters of the employees at its Jersey City, New Jersey facility to the payroll of the latter corporations (*ibid.*). Whereas the transferred workers previously had been covered by the collective bargaining agreement and were entitled to union wages and benefits, they were subsequently provided to Interstate by GS as "temporary help" not covered by the agreement (*ibid.*). Learning of this situation, Eason obtained the necessary number of authorization cards from GS employees showing their interest in having Local

[2] Petitioners were indicted together with Robert Rao, Sidney Lieberman, Stephen Kingston, David Bergner, Sidney Gerstein, Interstate Dress Carriers, Inc., and Local 102, International Ladies Garment Workers Union (Pet. App. 3a-5a). Lieberman was severed from the case in the middle of trial for health reasons; Rao, Kingston, Bergner and Interstate were acquitted; Local 102 pleaded nolo contendere to one count; and the charges against Gerstein were dismissed (*id.* at 6a n.1).

20408 represent them, and filed a petition with the NLRB seeking to have the local certified as collective bargaining agent (*id.* at 2a-3a).

Shortly after the petition was filed, Eason was contacted by petitioner DiLapi, an organizer for Local 522 of the International Brotherhood of Teamsters; DiLapi made an appointment to meet Eason on April 12, 1978, at Eason's office to discuss the petition for certification (Pet. App. 3a). Before DiLapi arrived, acquitted co-defendant David Bergner came to Eason's office and told him that he was about to meet "nasty boys" with organized crime connections who would think nothing of doing harm if he failed to cooperate (*ibid.*; Tr. 110-113).[3] DiLapi subsequently arrived, accompanied by petitioner Ladmer (secretary-treasurer of the International Production, Sales and Service Employees Union), the president of DiLapi's local, and an unidentified individual (Pet. App. 3a). After introductions, all but DiLapi left, and DiLapi offered Eason $1,000 in exchange for withdrawal of the petition and threatened him with harm if he refused (*id.* at 4a). Petitioner Ladmer then returned to the room and, out of DiLapi's presence, offered Eason $300 purportedly for Eason's cooperation in withdrawing an earlier petition for certification involving another company (*ibid.*). Eason contacted the FBI following this meeting and agreed

[3] "Tr." refers to the trial transcript. "Tr." followed by a date refers to transcripts of pretrial proceedings. "A." refers to the appendix filed in the court of appeals in Nos. 80-1013 to 80-1018, the interlocutory appeal by petitioners, Rao, Lieberman, Kingston, Bergner and Interstate from the district court order denying their motion to dismiss the indictment on double jeopardy grounds (see Pet. App. 46a-49a). The "Tr." references are based on record references in the government's briefs in the court of appeals.

to record all subsequent conversations with petitioners (*ibid.*).[4]

At a subsequent meeting between Eason and petitioners at Ladmer's office, both the inducements to withdraw the petition and the threats regarding failure to withdraw it were repeated (Pet. App. 4a-5a). DiLapi indicated concern during this meeting that the office might contain FBI recording devices, and Eason was instructed not to mention monetary amounts but merely to write them on pieces of paper (*id.* at 4a-5a). Ladmer communicated on paper that the offer to Eason was $3,500 (*id.* at 4a).

In a meeting a few days later between Eason and co-defendant Sidney Lieberman, Interstate's vice-president, Lieberman increased the bribe to $5,000 and offered to place 10 employees of Eason's choosing in ILGWU Local 102. Lieberman paid part of the bribe —$2,000 in "front money"—at this meeting (Pet. App. 5a).

2. The indictment was returned on September 6, 1978 (Pet. App. 26a). Thereafter Local 102 and Interstate sought, in the representation proceedings before the NLRB, to obtain the signed union authorization cards submitted by Eason to show the interest of the GS employees in being represented by Local 20408 (*ibid.*). These requests were denied by the NLRB hearing officer on November 13, 1978, on the ground that the cards were privileged.[5] On Decem-

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[4] Also, on April 14, 1978, Eason filed an amended petition with the NLRB adding Interstate (including its employees who were members of Local 102) as a company which he sought to organize (Pet. App. 4a, 26a; Tr. 151-155).

[5] Defendants' attempts to secure the cards from the Justice Department Organized Crime Strike Force prosecutors in the criminal proceeding were unsuccessful because the prose-

ber 29, 1978, Interstate served subpoenas on NLRB personnel directing them to produce, at the criminal trial then scheduled to commence on January 3, 1979, "all 'authorization cards or applications for membership in Local 20408' and 'other writings' concerning a 'showing of interest' by employees in Local 20408" (*id.* at 26a-27a).

Various grounds respecting the materiality of the cards were suggested; principally it was contended that defendants needed to see the cards to determine whether they were forged and, if forgery were revealed, to use the evidence to attack Eason's credibility (see DiLapi Pet. 5-6). The NLRB and the Strike Force prosecutors moved, on January 3, 1979, to quash the subpoenas on grounds of privilege (Pet. App. 27a). The district court called for the filing of legal memoranda and oral argument on the motions, but permitted jury selection to go forward (*id.* at 47a). The jury was selected on January 4 and 5, but it was not sworn and it heard no opening statements or testimony (*ibid.*).

3. On January 8, 1979, the court denied the motion to quash and directed the NLRB to turn over the cards to the defendants (Pet. App. 27a). The NLRB immediately filed an appeal and an application for mandamus with the court of appeals; both were dismissed on January 9 (*id.* at 27a). On January 11, 1979, the NLRB General Counsel formally declined to produce the authorization cards, citing the NLRB's policy of keeping confidential the identity of employees who sign union authorization cards in or-

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cutors possessed neither the cards nor copies of them (Tr. 1/10/79 at 108, 113). It was determined in December 1978 that Eason possessed copies, a fact communicated to the defense (A. 100).

der to protect them from possible threats of reprisal from employers or rival unions (see Pet. App. 36a-37a nn.5-7, 42a n.10).

The contempt adjudication enabled the NLRB to test the propriety of the district court's disclosure order, and the NLRB General Counsel promptly appealed to the court of appeals (Pet. App. 42a n.10). In the meantime, petitioners and the other defendants argued that the district court should swear in the jury and then dismiss the indictment (A. 397). The district court declined to swear in the jury, and discharged it, noting problems raised by newspaper publicity in the case and the requests of some jurors to be excused because of employment and family obligations (Pet. App. 47a-48a; A. 463-464).

On the NLRB General Counsel's appeal from the contempt adjudications, the court of appeals (1) affirmed with modification the district court's order denying the motions to quash, (2) affirmed the civil contempt order "insofar as it relate[d] to the * * * disclosure order as modified," and (3) vacated the criminal contempt order (Pet. App. 39a-42a). Specifically, the court of appeals held that the defense was entitled to examine the authorization cards to determine if they were forged, since such evidence might provide the basis for an entrapment defense or be used to impeach Eason's credibility (*id.* at 35a), but it acknowledged that there was an "important and valid public interest," both generally and on the facts of this case, in maintaining the confidentiality of the cards (*id.* at 37a, 39a),[6] and it accordingly modified the disclosure order to provide

[6] The court noted the filing of a sealed affidavit from one of the Strike Force prosecutors that substantiated threats of violence "in the instant case" (Pet. App. 37a n.7).

that the cards should be disclosed to defense counsel "but * * * not * * * to the defendants themselves" (*id.* at 39a). Thereafter, on May 8, 1979, the cards were produced to the defendants' counsel (A. 191).[7]

4. In a letter to the district court dated May 31, 1979, Interstate announced its intention to move to dismiss the indictment on double jeopardy grounds (A. 192-193). When no such motion was filed forthwith, the court, on June 11, 1979, directed that the defendants file and serve any motion and supporting memoranda on the double jeopardy issue by July 9, 1979 (A. 473-474). By letter to the court dated June 18, 1979, Interstate contended that the court lacked jurisdiction to proceed with the case and that a double jeopardy motion would thus be premature because the court of appeals' mandate in the appeal by the NLRB General Counsel from the contempt order had not been issued.[8] In response, the court on June 21, 1979, vacated its order setting a date for filing a double jeopardy motion. On August 31, 1979, the court of appeals, acting on the government's motion, issued its mandate in the contempt case. On September 12, 1979, the government requested, without avail, that the defendants be required—in order to avoid further delays of trial—to make any double

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[7] The defendants never introduced the cards into evidence during the trial nor used them as a basis for cross-examining Eason; and petitioners do not contend that any of the evidence they submitted was developed from the cards.

[8] On May 31, 1979, the defendants moved the court of appeals to stay its mandate to allow them time to petition for certiorari, and on June 12, 1979, the mandate was stayed. That petition (*DiLapi* v. *Irving*, No. 79-51), asserting that the court of appeals exceeded its authority by modifying the district court's disclosure order, was filed on July 11, 1979, and denied on October 1, 1979 (444 U.S. 866).

jeopardy motion promptly (A. 477-478). On October 30, 1979, the court set November 13, 1979, as the trial date (A. 484), and only after this scheduling order did the defendants file their double jeopardy motion. The motion was denied on January 7, 1980 (A. 511-513), and on February 19, 1980, the court of appeals affirmed (Pet. App. 46a-49a). A motion to dismiss the indictment on speedy trial grounds—filed by petitioner Ladmer and three other defendants, but not joined by petitioner DiLapi—was denied on April 14, 1980, on a finding that the reason for the delay was "the time consuming resolution of the numerous pre-trial motions * * * litigated by the defendants in regard to the various procedural [requests] made by the defendants" (Tr. 4/14/80 at 13-13A). Trial commenced on April 22, 1980.

ARGUMENT

1. Petitioner DiLapi makes three arguments based upon the initial refusal by the NLRB General Counsel to comply with the subpoenas and the proceedings that resulted from that refusal. First, he contends (Pet. 17-18) that, instead of holding the General Counsel in contempt for the initial refusal to produce the cards, the trial court should have dismissed the indictment. Second, he argues (Pet. 19-22) that his trial before the second jury, after the first unsworn jury had been dismissed to allow time for an appeal from the contempt order, violated his rights under the Double Jeopardy Clause. Finally, he contends (Pet. 22-25) that he was deprived of his right to a speedy trial by the delay attendant upon the appeal from the contempt order. None of these contentions has merit.[9]

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[9] DiLapi, who did not join the motion to dismiss on speedy trial grounds, failed to preserve the issue and is thus pre-

a. The argument that the General Counsel's initial refusal to produce the authorization cards required immediate dismissal of the criminal indictment under *Jencks* v. *United States*, 353 U.S. 657 (1957), is based on several erroneous premises. First, it assumes that the withholding by the NLRB is attributable to the Strike Force prosecutors because all are part of the federal government. But materials do not come within the *Jencks* rule unless they are within the possession of the prosecutorial arm of the government. *United States* v. *Dansker*, 537 F.2d 40, 61 (3d Cir. 1976), cert. denied, 429 U.S. 1083 (1977); *United States* v. *Trevino*, 556 F.2d 1265, 1271 (5th Cir. 1977). As the court of appeals correctly held in the appeal from the contempt adjudications (Pet. App. 31a), "the General Counsel has no control over a criminal prosecution brought by the Justice Department," and the NLRB "is not subject to direct control by the Executive Branch, but rather is an independent regulatory agency created by statute * * *." [10] *Jencks* is also inapposite because it con-

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cluded from raising it here. However, Ladmer, who did join in the motion and therefore preserved the issue for himself, joins in all the arguments urged in the DiLapi petition (see Ladmer Pet. 8).

[10] *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 10 (1972), on which petitioner DiLapi relies (Pet. 25) for the proposition that "the government [must be treated] as a unit," in fact indicates why it is inappropriate to equate the NLRB's efforts to protect the confidentiality of authorization cards with withholding of material by the prosecutors in this case. In *S&E Contractors* the Court held that the Department of Justice was not empowered to seek judicial review of an administrative decision by the Atomic Energy Commission regarding a contract dispute between an AEC contracting officer and a contracting firm. The AEC was "the United States" for the purpose of such disputes, the Court concluded,

cerns "statements or reports * * * of government witnesses" (353 U.S. at 672); whatever the merits of petitioners' unsubstantiated allegations of forgery, the cards could not be considered "statements" of government witness Eason. Finally, the remedy for a violation of the *Jencks* principle is not dismissal of criminal charges, but a new trial at which the materials are provided to the defense. Here, of course, petitioners had access to the materials prior to trial.

b. The simple answer to DiLapi's double jeopardy contention is that, in the case of a jury trial, jeopardy does not attach until the jury is empaneled and sworn. *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *Serfass* v. *United States*, 420 U.S. 377, 388 (1975).[11] DiLapi argues that, because *Crist* v. *Bretz*, *supra*, refers to a defendant's "valued right" to continue with the chosen jury, it supports the proposition that jeopardy attaches before the empaneled jury is sworn. But the Court in *Crist* stated that its prior decisions had "necessarily pinpointed the stage in a jury trial when jeopardy attaches" (437 U.S. at 35), and that, while "it might then be

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and its decisions were not reviewable by other departments (406 U.S. at 10-12). By the same token, here the Strike Force had no control over the NLRB's determination to invoke a claim of privilege.

[11] As the court of appeals noted (Pet. App. 49a), jeopardy may attach where the trial begins without the jury's having been sworn and the oath then becomes a mere formality. But this is not such a case; and indeed, petitioners and their co-defendants indicated their awareness of the significance of swearing in the jury since, as noted above, they responded to the NLRB's initial refusal to disclose the authorization cards by asking the district court to swear in the jury before discharging it (see page 7, *supra*).

concluded that the point of the attachment of jeopardy could be moved a few steps forward or backward without constitutional significance" (*id.* at 37), the rule establishing that point is "a settled part of federal constitutional law" which " 'serves as the linchpin for all double jeopardy jurisprudence' " (*id.* at 38, quoting 546 F.2d at 1343). However broad a reading might be given to some of the language of *Crist* (see 437 U.S. at 38-39, Blackmun, J., concurring), the case clearly does not require reversal of the decision below.

In any event, even if jeopardy could be said to have attached before the jury was sworn, there was "manifest necessity" for its dismissal. See *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). While the defendants objected to dismissing the unsworn jury, they did not support the prosecution request that the trial proceed on a delayed basis. Faced with a refusal by most of the defendants either to go to trial immediately or to agree to a delayed trial before the empaneled jury, the trial court acted reasonably in dismissing the jury.[12]

c. The speedy trial claim is totally baseless. Although the defendants knew from the beginning that the NLRB both possessed the cards and regarded them as privileged, and were also informed that Eason had copies of the cards, they persisted in attempting to obtain the cards from the prosecutor through discovery, never attempted to subpoena the copies of the cards from Eason, and did not direct a subpoena to the NLRB until the eve of trial, despite the certainty that the NLRB's claim of privilege

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[12] DiLapi's contention (Pet. 21 n.12) that the dismissal of the jury was necessitated by "the Government's intentional misconduct" is, as we show (pages 10-11, *supra*, and page 13, *infra*) without foundation.

would necessitate a delay while the claim was tested.[13] As we have shown, the "contempt" in the failure to produce the cards was that of an official of an independent agency and not that of the "the Government" as DiLapi contends (Pet. 22). Moreover, contrary to DiLapi's suggestion (*ibid.*), the action of the NLRB General Counsel in initially refusing to produce the cards was not willful disobedience of a court order but rather a reasonable means for testing the propriety of the district court's unconditional disclosure order. As the court of appeals concluded (Pet. App. 39a-40a, 42a n.10), the order was improperly broad, and in refusing to disclose the cards to the defendants under the terms of that order, the General Counsel chose the only "feasible alternative" to accepting a serious violation of the Board's legitimate confidentiality policy. Thus, the four-month period during which the propriety of the disclosure order was litigated in the court of appeals was excludable under the Speedy Trial Act, 18 U.S.C. 3161(h)(8)(A), as a continuance granted in the interest of justice, as the district court found (Tr. 4/16/79 at 24-26; order of Bramwell, J., May 1, 1979). The remaining delay before trial actually commenced was occasioned entirely by the defendants' procedural maneuvers. They moved the court

[13] The inference is compelling that production of the cards was sought solely as a tactical ploy to provide a basis for a motion to dismiss. The defendants made no trial use of the cards once they obtained them. Although, in seeking production, they claimed that the signatures on the cards could well have been forged (see page 6, *supra*), they never had the cards examined for forgery by handwriting experts (Tr. 10/30/79 at 6), even though Interstate's corporate records include handwriting exemplars of the signatures of its employees (Tr. 1/8/79 at 36).

of appeals to stay its mandate while they petitioned for certiorari, took the full 90 days allowed to them to file their petition, waited until a new trial date was set (one month after their petition for certiorari was denied) before they filed their double jeopardy motion, consumed further time with what was (as we have shown) essentially a frivolous appeal from denial of that motion, and consumed still further time with their speedy trial motion. In sum, the entire delay of trial is attributable, directly or indirectly, to the defendants, reflecting a calculated pattern of disruptive and delaying tactics. It would be an affront to justice to reward this conduct with dismissal of the charges against petitioners.

2. DiLapi also contends (Pet. 11-17) that his right to counsel was violated by trial court rulings restricting the use that could be made of the authorization cards after they were produced, and by a court order that he not confer with his counsel during a five-minute recess called in the middle of his cross-examination. Neither claim has merit.

a. In its ruling on the NLRB General Counsel's appeal from the contempt order, the court of appeals modified the trial court's disclosure order by providing (Pet. App. 39a-40a) that the cards were not to be disclosed to the defendants themselves, that they were to be produced in bulk rather than individually so as to ensure that knowledge of the identities of the employees who had executed the cards would be confined to counsel, and that counsel could interview those who had executed the cards only outside the presence of the defendants and in the presence of the court or a magistrate. Subsequently, the court of appeals granted the defendants' petition for a writ of mandamus to the limited extent of allowing counsel to conduct interviews outside the presence of the court and at any location where the card signers

were found, on the condition, *inter alia*, that the identities of those interviewed and the substance of what they said not be revealed to the defendants (Pet. App. 50a-51a).[14] Contrary to DiLapi's assertion, the trial court did not impose additional restrictions inconsistent with the orders of the court of appeals. Counsel were not forbidden, as DiLapi claims (Pet. 15), to discuss the cards with their clients; they were free to discuss the use of the cards in preparation of the defense and forbidden only to reveal to their clients the names of those who had executed the cards (Tr. 5/7/79 at 16-18). Nor were counsel limited, as DiLapi further claims (Pet. 7-8, 15), to written contact with the card signers advising the latter of their right not to respond and requiring them to telephone counsel for an appointment. Counsel were permitted to make personal contact, but chose to proceed by mail (Tr. 4/14/80 at 36-45). The only restriction on the mail contact was that the card signers be advised of their right to be

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[14] These limitations were reasonable, given the real potential for retaliation against the card signers if their identities became known to the defendants themselves (see page 7 & note 6, *supra*). A defendant's right to counsel does not include an automatic right to participate in the interviewing of potential defense witnesses. Compare *United States* v. *Farries*, 459 F.2d 1057, 1062 (3d Cir. 1972), cert. denied, 410 U.S. 912 (1973). Petitioner DiLapi does not show how either he or petitioner Ladmer—who presumably were strangers to the card signers, since they were officials of unions having no contact with Interstate's employees—could have aided in the process of developing defense evidence by being present at the interviews or otherwise learning the identity of those interviewed.

interrogated in a noncoercive manner (order of Bramwell, J., Nov. 15, 1979).[15]

b. The prosecutor obtained a five-minute recess during his afternoon cross-examination of petitioner DiLapi and "requested that DiLapi 'be instructed on cross-examination not to speak with his attorney' " (Pet. App. 13a). Having given a similar instruction at DiLapi's request respecting government witness Eason, the court "instructed DiLapi * * * not [to] discuss the case until he comes back to the stand" (*ibid.*).[16] The court of appeals held (*id.* at 15a-16a) that it was error to bar a defendant from consulting with his counsel during any trial recess, but that, since there was "not even a remote risk of actual prejudice," reversal was not required.

There is no reason to afford further review of the limited question presented—whether a momentary interference with a defendant's access to his counsel is a sufficient deprivation of the right to counsel to require reversal. For, contrary to petitioner DiLapi

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[15] The three cases cited by DiLapi on this issue (Pet. 16)—*International Business Machines Corp.* v. *Edelstein*, 526 F.2d 37, 41-44 (2d Cir. 1975); *Gregory* v. *United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), cert. denied after remand, 396 U.S. 865 (1969); and *Coppolino* v. *Helpern*, 266 F. Supp. 930, 935-936 (S.D.N.Y. 1967)—are totally inapposite, since they involved restrictions on defense interviews with government witnesses. The card signers were not government witnesses, but merely potential defense witnesses on a collateral issue.

[16] Because cross-examination was completed and redirect commenced on that day, both the prosecutor's and the court's precise language disposes of DiLapi's claim (Pet. 12 n.8) that the instruction carried over to the overnight recess. Significantly, DiLapi does not assert that, in fact, he and his counsel refrained from consulting during the overnight recess.

(Pet. 12-13), the decision below does not conflict with decisions of other circuits applying the rule of *Geders* v. *United States*, 425 U.S. 80 (1976).

In *Geders* the defendant and his counsel were forbidden to confer during a 17-hour overnight recess. The potential for actual prejudice when communication is cut off for so long a period is self-evident. As the Court explained (425 U.S. at 88):

> It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

Clearly a five-minute recess cannot possibly be a time "of intensive work, with tactical decisions to be made and strategies to be reviewed" or even a time in which to discuss the significance of the day's events. Thus the Court, which carefully noted (*id.* at 91) that it did not "deal with" any "limitations imposed in other circumstances" and did not have before it "a brief routine recess during the trial day" (*id.* at 89 n.2), in no way precluded a holding that a prohibition on communication covering a five-minute recess during cross-examination would not violate the Sixth Amendment, much less require reversal.

Indeed, as Judge Mishler noted in his concurrence (Pet. App. 19a-20a), by suggesting that a trial judge could order a cross-examination to continue without recess in order to prevent improper coaching of a witness (425 U.S. at 90-91), the Court in *Geders* plainly assumed that a defendant has no Sixth Amendment guarantee that he will enjoy the advice of counsel to guide his testimony during cross-examination. The enjoyment of such a right surely should not turn on the fortuity of a prosecution request for a brief recess during cross-examination.

The post-*Geders* cases on which DiLapi relies are all distinguishable. In *United States* v. *Conway*, 632 F.2d 641, 643 (5th Cir. 1980), and *United States* v. *Bryant*, 545 F.2d 1035 (6th Cir. 1976), the restrictions were during the luncheon recess. *Bryant* specifically noted that "an hour-long luncheon recess" is a time "when a party on trial would ordinarily be entitled to consult with his attorney." 545 F.2d at 1036. The court in *United States* v. *Vesaas*, 586 F.2d 101, 102 n.2 (8th Cir. 1978)—which reversed the conviction on grounds of defects in the indictment and insufficient evidence—merely expressed "grave doubts" that even a brief restriction on consultation (the duration of which was not indicated in the record) could be squared with the Sixth Amendment. Finally, in *United States* v. *Allen*, 542 F.2d 630 (4th Cir. 1976), cert. denied, 430 U.S. 908 (1977)—where the restriction applied to two recesses, one lasting 20 minutes (allowing considerably more time for real consultation than the five-minute recess here) and the other apparently about "a minute" (see 542 F.2d at 632)—the Fourth Circuit applied its reversible error holding prospectively only (*id.* at 634). That, in effect, is what the court of appeals did in this case (see Pet. App. 16a).

3. DiLapi contends (Pet. 25-30) that his due process rights were violated when the court, at sentencing, heard uncorroborated hearsay evidence concerning his alleged connection with organized crime figures. The simple answer is that, although DiLapi was the principal actor in the conspiracy to threaten and bribe Eason into withdrawing the petition for certification, he received the same sentence as Ladmer, as to whom no evidence concerning an organized crime connection was offered at sentencing. It is readily apparent, therefore, that the court imposed sentence on both petitioners on the basis of the gravity of the offense, as shown by the trial evidence, without regard to any organized crime connections. Thus, *United States* v. *Weston*, 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972), upon which DiLapi relies (Pet. 29), is inapposite, since there the court expressly relied in pronouncing sentence on the hearsay evidence in the presentence report. Before receiving the report, compiled at the government's request, the court had indicated an intention to impose a minimum sentence (see 448 F.2d at 628).[17]

In any event, the Constitution does not restrict sentencing judges to considering only trial-competent evidence received in open court. *Williams* v. *New York*, 337 U.S. 241, 251 (1949). Contrary to DiLapi's assertion (Pet. 27-28), neither *Gardner* v. *Florida*,

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[17] *United States* v. *Bass*, 535 F.2d 110 (D.C. Cir. 1976), upon which DiLapi also relies (Pet. 29), while viewing the *Weston* holding favorably (see 535 F.2d at 120), affirmed a sentence influenced by uncorroborated hearsay evidence because the hearsay report was disclosed to the defendant and he did not dispute its truthfulness. *Id.* at 121. Here, the hearsay evidence was presented in open court.

430 U.S. 349 (1977), nor *Specht* v. *Patterson*, 386 U.S. 605 (1967), represents a retreat from the *Williams* rule. *Gardner* turned on the principle that the imposition of capital punishment calls for higher standards (see 430 U.S. at 357-358 (plurality opinion) and *id.* at 362-363 (White, J., concurring)). Moreover, the flaw in the sentencing procedure in *Gardner* was not that uncorroborated hearsay information was considered, but that—unlike here—the hearsay information was treated as confidential and not disclosed to the defendant or his counsel. *Id.* at 358-362, 363. *Specht* held simply that the invocation, for sentencing purposes, of a statute more severe than the one under which the defendant was charged (a procedure authorized by state law) entails the making of a new charge and requires, under the Due Process Clause, that the defendant be afforded a full-fledged hearing. That holding is clearly inapposite to this case.

4. The jury sent notes indicating that it had reached a verdict on four defendants (presumably the four who were acquitted) but was sharply divided on the remaining two, and it requested legal definitions of key terms in the charge. Thereafter it sent a second and third note, asking if it was necessary, in order to reach a guilty verdict on the substantive count, to find the defendant guilty of all acts charged in the count, "or can they be separated?" (Pet. App. 8a). The court responded that "[t]hey can be separated" but it declined a defense request that the jurors be instructed that they must be unanimous as to each act they found to be proven (*id.* at 9a). Thirty minutes later, the jury sent another note asking the same question in another form. The court's response was to reread the portions of its original charge concerning

the statute, the elements of the substantive offense, and aiding and abetting (Pet. App. 9a).

Ladmer contends (Pet. 4-8) that, in view of the jury's obvious confusion, the court's refusal to reinstruct on the requirement of unanimity left open the possibility that the jury's verdict did not reflect unanimity on any single specific act. As the court of appeals correctly held, however, in an analysis upon which we rely (Pet. App. 10a-11a), the jurors' inquiries reflect no uncertainty concerning the unanimity requirement. Their only uncertainty was whether they had to reach a unanimous verdict that the defendants had committed all of the acts specified in the count or could convict if they agreed as to only some of the acts. Reinstruction on the general unanimity requirement was therefore unnecessary.[18]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1982

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[18] Ladmer also presents a question whether his right to a fair trial was violated by the admission of testimony suggesting that he was connected to organized crime (Ladmer Pet. i); but since he does not argue the question or even specify the testimony concerned, the matter does not require a response.

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